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November 9, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: TSO-0192

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (the Individual) to possess an access authorization under the Department of Energy (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."^{1/} A Local Security Office refused to grant the Individual's access authorization pursuant to the provisions of Part 710. As discussed below, after carefully considering the record before me in light of the relevant regulations, it is my decision that the Individual's access authorization be granted.

I. *Applicable Regulations*

The regulations governing an individual's eligibility for access authorization are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

^{1/} Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a). Such authorization will be referred to from time to time in this Decision as access authorization or security clearance.

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. *Id.* § 710.21(b)(3). The burden is on the individual to present testimony and other evidence to demonstrate that he is eligible for access authorization, i.e., that access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." *Id.* § 710.27(a).

II. Background

The Individual is employed at a DOE facility. His employer requested a security clearance for him, and the Individual completed a "Questionnaire for National Security Position" (QNSP). In the QNSP, the Individual reported that he had tried marijuana a couple of times during the last six to seven years. As a result of his answers to questions on the QNSP, the Individual was brought in for a Personnel Security Interview (PSI). DOE Exhibit (DOE Ex.) 8 at 2-3. In addition to confirming his use of marijuana, the Individual indicated that his domestic partner uses medical marijuana^{2/} occasionally. The Individual was referred to a DOE consultant psychiatrist (DOE Psychiatrist). DOE Ex. 6. Subsequent to interviewing the Individual, the DOE Psychiatrist wrote an evaluative report describing his findings. *Id.* The report states that the DOE Psychiatrist examined the Individual and reviewed the Case Evaluation, Transcript of the PSI, and QNSP, all of which were provided by DOE. Based upon the examination and his review of the DOE records, the DOE Psychiatrist did not find that the Individual suffered from a mental illness or disorder. *Id.* Further, he opined that the Individual did not show any signs or symptoms that would cause a significant defect in judgment or reliability. *Id.* However, in the DOE Psychiatrist's opinion the Individual exercised poor judgment in trying marijuana. *Id.* He concluded that the Individual did not show any other aspects of poor judgment in his history. *Id.*

This proceeding commenced when, by letter dated August 4, 2004, the Local Security Office informed the Individual that it possessed derogatory information that created a substantial doubt as to the Individual's eligibility for an access authorization under 10 C.F.R. § 710.8.

^{2/} Medical marijuana refers to the use of marijuana as a physician-recommended herbal therapy. Medical marijuana is used for symptoms such as pain relief, control of nausea and vomiting, and appetite stimulation. http://en.wikipedia.org/wiki/Medical_marijuana#United_States. Since 1996, eleven states, including Alaska, Arizona, California, Colorado, Hawaii, Maine, Nevada, Oregon, Rhode Island, Vermont, and Washington, have legalized medical marijuana use. <http://www.drugwarfacts.org/medicalm.htm>. visited October 4, 2006 (citing http://www.norml.org/index.cfm?Group_ID=3391, last accessed Jan. 4, 2006, and http://www.mpp.org/RI_number_11.html, last accessed Jan. 4, 2006).

DOE Ex. 3 at Enc. 2. In the August 4, 2004 Notification Letter to the Individual, the Local Security Office cited the Individual's answer of "yes" on his QNSP when asked if he had ever used marijuana, as the derogatory information that created a substantial doubt as to the Individual's eligibility for an access authorization under 10 C.F.R. § 710.8(l) (Criterion L).^{3/} The Notification Letter also cited that part of the PSI where the Individual told the PSS that he had last used marijuana approximately five months prior to the completion of the QNSP. In addition, he volunteered that his domestic partner had a prescription under state law for medicinal marijuana. Finally, the Notification Letter referred to the DOE Psychiatrist's statement that the Individual used poor judgment.^{4/} DOE Ex. 3 at Enc. 2. Use of illegal drugs always raises security concerns. In response to the concerns, however, the Individual maintains that he never used marijuana when he held an access authorization previously and he would not use it if he held an access authorization. The facts in this case, those which raised the security concerns, are not in dispute.

Upon receipt of the Notification Letter, the Individual requested a hearing. The DOE transmitted the hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. 10 C.F.R. § 710.25(a), (b). I convened a hearing in this matter as prescribed by the DOE regulations. 10 C.F.R. § 710.25(g).

III. Standard of Review

Under Part 710, DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). After a question concerning an individual's eligibility for an access authorization has been properly raised, the burden shifts to the individual, who must come forward with convincing evidence that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." See 10 C.F.R. § 710.27(a).

^{3/} Criterion L refers to information indicating that an individual has "engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security." 10 C.F.R. § 710.8(l).

^{4/} The Notification Letter states "it is [the DOE Psychiatrist's] opinion that [the Individual] exercises poor judgment because he has not distanced himself from others who use marijuana." DOE Ex. 3 at Enc. 2. The DOE Psychiatrist actually opined that the Individual used poor judgment in using marijuana when he does not like it and knows it is illegal. DOE Ex. 6 at 6.

In considering the question of the Individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the Individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors.

After consideration of all the relevant information in the record, I conclude that the security concerns raised by the derogatory information have been mitigated. Consequently, it is my decision that the Individual's access authorization should be granted.

IV. The Hearing

At the hearing, the Individual was represented by an attorney. The Individual offered his own testimony as well as the testimony of four co-workers, two long-time family friends, and his domestic partner. The Local Security Office presented two witnesses, the DOE Psychiatrist and the DOE Personnel Security Specialist (PSS). The local DOE Office also entered twelve exhibits into the record. The Individual entered four exhibits into the record.

The core concern in the present case is whether the Individual lacks judgment and reliability. At the Hearing, the DOE Psychiatrist confirmed his opinion that the Individual showed poor judgment in using marijuana while knowing it is an illegal substance. Transcript of Hearing (Hearing Tr.) at 192–194. The DOE Psychiatrist did not find that the Individual was substance dependent. *Id.* at 192-193. The DOE Psychiatrist testified that the Individual has been very honest during the entire process and did not marginalize his use of marijuana. *Id.* at 197.

The PSS testified that a security concern is raised when an individual associates with individuals who are involved with illegal drug use. *Id.* at 50. The PSS indicated that DOE's concern is that the Individual associates with, and in this instance lives with, a person who uses an illegal substance. *Id.* at 70. The PSS stated, however, that if the Individual was friends with individuals who used marijuana for medicinal purposes, but did not do so in the Individual's presence, there would not be a security concern. *Id.* at 67-68.

The Individual's supervisor testified on his behalf. He stated that the Individual is conscientious and reliable. *Id.* at 33. His supervisor testified that when there is a discussion of taking an easier way to do something, the Individual often points out the risks and keeps

the team on track. *Id.* at 31. His supervisor stated that the Individual is very open and honest. *Id.* at 45.

A current co-worker of the Individual testified that the Individual has good organizational skills. *Id.* at 91. In addition, the Individual has created a website to make work-related information available to those who need it within his working group. *Id.* The current co-worker testified that the Individual is very hard working and very diligent. *Id.* at 95. The Individual has never been dishonest with the co-worker. *Id.* at 96.

A previous co-worker, who worked with the Individual during a previous period when the Individual held an access authorization, testified. He testified that the Individual was honest, trustworthy, and reliable. *Id.* at 84. The Individual was responsible for and successfully guarded the security of a source code^{5/} for a product the company was developing. Release of the source code could have seriously damaged the product. *Id.*

A previous supervisor also testified for the Individual. He stated that the Individual was honest and reliable. *Id.* at 101, 103. According to his testimony, the Individual always told the absolute truth, even if he made a mistake that would have been easy to conceal. *Id.* at 103.

Two long-time family friends testified for the Individual. The first witness was the Individual's pastor when he was a youth. He testified that he had contact with the Individual a couple of times a week during the Individual's teenage years and that his daughter remained in contact with the Individual so he heard about the Individual's activities in the following years. *Id.* at 110. The witness asserted that the Individual was truthful and had integrity. *Id.* at 111. The second long-time family friend was the pastor's wife. She stated that she had frequent contact with the Individual while he was growing up because she conducted a singing group that he was involved in. *Id.* at 119. She testified that he was a very caring, very honest person. *Id.* at 120. She stated that he did not give in to peer pressure and was a leader in the group. *Id.*

The Individual's domestic partner testified. He stated that they have been together 13 years. *Id.* at 126. The partner testified that he has a state-authorized prescription for medicinal marijuana. *Id.* at 131. He has used his prescribed marijuana only once in the last

^{5/} A source code is the form in which a computer program is written by the programmer. Source code is written in some formal programming language which can be compiled automatically into object code or machine code or executed by an interpreter. Dictionary.com. *The Free On-line Dictionary of Computing*, Denis Howe. [http://dictionary.reference.com/browse/source code](http://dictionary.reference.com/browse/source+code) (accessed: October 04, 2006). A computer program's source code is the collection of files that can be converted from human-readable form to an equivalent computer-executable form. http://en.wikipedia.org/wiki/source_code.

eight months. *Id.* at 132. He stated that he smokes it in the attached garage of the home he shares with the Individual. *Id.* at 135. The Individual is never present when he smokes the marijuana. *Id.* at 136. The partner stores his medicinal marijuana with his other medications. *Id.* He testified that the Individual is the most honest person he has ever met. *Id.* at 142. He continued that often it can be disturbing because he is very, very honest about everything. *Id.*

The Individual testified on his own behalf. He testified that in 1978, after his first year in college, he tried marijuana. *Id.* at 154. He stated that during the 20 years he held an access authorization, he never smoked marijuana. *Id.* at 159. After he left the position that required an access authorization, he tried marijuana two to three times. *Id.* at 159-160. He did not inhale the marijuana. *Id.* He also testified that he is not present in the garage when his partner smokes the medicinal marijuana. *Id.* at 162. He stated that it is possible he walked through the garage when the partner was smoking. *Id.* He wanted to be as honest as possible, so in his PSI, he stated it was possible he was present. *Id.* He testified that he not in the vicinity of people that smoke marijuana. If he is present, people do not smoke it, because they know he does not like it. *Id.*

V. Findings and Conclusions

After reviewing the testimony presented in this case as well as the other evidence contained in the record, I find that the Individual did use poor judgment in using marijuana on a couple of occasions. This poor judgment does raise a security concern. However, I find that the Individual has mitigated this concern. Initially, I note that the last possible usage of marijuana occurred in 2002, well over two years prior to the hearing. During the time the Individual held an access authorization previously, there was no allegation of drug use, and he testified he did not use marijuana or any other illegal drug.

Under Criterion L, derogatory information consists of information that the individual has

engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security.

10 C.F.R. § 710.8(l). I believe that the testimony at the Hearing showed that the Individual is honest, reliable, and trustworthy. His co-workers, both past and present, testified that he can be trusted to keep important information confidential. The Individual was chosen to safeguard the sources codes of projects at two previous employers. His release of the source codes would have been detrimental to his employers and valuable to competitors.

I heard testimony that he is honest in his relationships to the point that he does not tolerate lying.

The second part of Criterion L regards pressure, coercion, exploitation, or duress that would cause the Individual to be subject to blackmail. The Individual's association with people who use marijuana for medicinal purposes is known. He testified that, as did his domestic partner, it is not something that he keeps hidden. This behavior by the Individual also tends to show that he is honest. The testimony of his supervisor confirms this.

I was convinced by the Individual's witnesses that he is an honest individual who is trustworthy and reliable. I do not believe in this case his limited association with individuals who use medicinal marijuana to be a deterrent to his holding an access authorization. The Individual does not use marijuana. Although it is present in his home, his partner keeps only a minimal amount in the house. I do not believe that the Individual would be subject to pressure, blackmail, or other coercion.

VI. Conclusion

Upon consideration of the record in this case, I find that there is evidence that raises a doubt regarding the Individual's eligibility for a security clearance. However, I find sufficient evidence in the record to mitigate any concern raised. Therefore, I conclude that restoring the Individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Consequently, it is my decision that the Individual's access authorization should be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: November 9, 2006